93-355

SUPREME COURT, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JOHN FRANCIS COSGRIFF,
Petitioner,
vs
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS THE SEIZURE OF THE HAND ROLLED CIGARETTE BY THE ARRESTING OFFICER WITHOUT PROBABLE CAUSE AND THUS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WAS THE PROHIBITION AGAINST DOUBLE JEOPARDY PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN THE TRIAL COURT REFUSED TO CONSOLIDATE PETITIONER'S TRIALS AND THE PETITIONER WAS SUBSEQUENTLY TRIED IN BOTH OAKLAND COUNTY AND MACOMB COUNTY ON THE SAME FACTS AND CIRCUMSTANCES?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner, JOHN FRANCIS COSGRIFF, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Michigan Supreme Court refusing to: 1). suppress the evidence obtained from the seizure of the hand-rolled cigarette from the cab of Petitioner's vehicle and 2). vacate Petitioner's conviction from the Macomb County Circuit Court because it violated Petitioner's constitutional protection against double jeopardy.

OPINIONS BELOW

The first opinion of the Michigan Court of Appeals regarding the Oakland County conviction was issued in an unpublished per curiam opinion, decided June 25, 1991. In this opinion, the Court addressed the seizure issue which involves Question Presented I in this Petition For A Writ Of Certiorari. The Petitioner timely filed an Application for Leave to Appeal to the Michigan Supreme Court which was initially held in abeyance on January 31, 1992, and ultimately denied in an order from the Michigan Supreme Court on August 31, 1992. (See Appendix A).

The second opinion of the Michigan Court of Appeals regarding the Macomb County conviction was issued in an unpublished per curiam opinion, decided April 28, 1992. In lieu of the first opinion from the Michigan Court of Appeals, this panel of the Court of Appeals refused to address the seizure issue. Once again, the Petitioner made a timely Application for Leave to Appeal to the Michigan Supreme Court, which was denied by the Michigan Supreme Court on December 9, 1992. The Petitioner timely filed a Motion for Reconsideration of the Michigan Supreme Court's order of December 9, 1992, which once again was denied by the Michigan Supreme Court on May 28, 1993. (See Appendix B).

JURISDICTION

This Court's jurisdiction is invoked under Title 28, U.S.C. sec. 1257.

STATUTORY PROVISIONS INVOLVED

The Fourth and Fifth Amendments to the United States Constitution are set forth in Appendix C of this Petition.

STATEMENT OF THE CASE

On March 1, 1987, the Petitioner, JOHN F. COSGRIFF, was stopped by Michigan State Police Trooper Crawford for exceeding the speed limit on I-75 in the City of Hazel Park, Michigan. (Trial Transcript (TT) 5-4-89, p.135-137). After approaching Petitioner's vehicle, Trooper Crawford noticed a hand rolled cigarette on a blue jacket in the cab section of the pickup truck. (TT 5-4-89, p. 146). Trooper Crawford asked the Petitioner to step from the vehicle. Trooper Crawford then reached into the cab, grabbed the hand rolled cigarette, and placed Petitioner under arrest for possession of marijuana. (TT 5-4-89, p.149).

Trooper Crawford patted down Petitioner for weapons or contraband and seized a brown vial containing cocaine from the Petitioner's pocket. He then commenced a search of Petitioner's vehicle. (TT 5-4-89, p.150-51). Subsequently, Trooper Scott arrived at the scene and continued the search of the vehicle while Trooper Crawford completed his paperwork. (TT 5-4-89, p.156). Trooper Scott found a luggage bag containing marijuana (TT 5-4-89, p. 157), and a taser gun (TT 5-4-89, p. 157). At that time, the two Troopers decided to impound the vehicle, which was transported to the State Police Post in New Baltimore. (TT 5-5-89, p.17). At the State Police Post, the Troopers continued their search of the truck. (TT 5-5-89, p.26, 28).

Petitioner was charged with possession with intent to deliver marijuana, possession of under 50 grams of cocaine and possession of a taser gun by the Oakland County Prosecutor's Office.

On March 31, 1987, Detective Sergeant Ackley of the Michigan State Police received an anonymous tip from the Drug Enforcement Administration. (TT 5-9-89, p.7). Ackley procured the services of Trooper MacDonald to have a dog sniff the Petitioner's vehicle in order to determine, by indication from the

dog, whether or not narcotics were present in the pickup truck. After the dog reacted positively for narcotics, a search warrant was obtained to search the vehicle wherein three and one-half kilograms of cocaine were found. (TT 5-9-89, p.11-17). The three and one-half kilos of cocaine were removed from the vehicle (TT 5-9-89, p.16) and the State Police prepared packages of "bogus cocaine" substantially resembling the eight packages containing cocaine which were removed from the truck (TT 5-9-89, p.22-25). The State Police also installed an electronic monitoring device in order to "track" Petitioner's vehicle. In addition to the above alterations, the State Police installed an alarm system which, when the side panels of the vehicle were opened, would render a signal indicating that those panels had been opened. (TT 5-9-89, p.26, 31, 121, 124).

On May 26, 1987, Petitioner's attorney, at that time George Birch, and Petitioner arrived at the Michigan State Police Post to obtain the return of the vehicle pursuant to an agreement between the Michigan State Police and Petitioner. (TT 5-9-89, p.37-38). Petitioner was placed under surveillance by law enforcement authorities, and was observed driving to Chaplin's Bar, where he met with George Birch and an individual later identified as David Breger. After a short period of time, all three men, operating three separate vehicles, departed from Chaplin's Bar and drove to a car wash. The Petitioner and George Birch each drove their vehicles into separate bays of the car wash, and upon activation of the installed alarm system, all three were arrested. (TT 5-9-89, p. 38; 5-10-89, p. 33-44).

All three individuals were charged with conspiracy to possess with intent to deliver 650 or more grams of cocaine by the Macomb County Prosecutor's Office. Petitioner COSGRIFF was subsequently charged with possession of 650 or more grams of cocaine by the Oakland County Prosecutor's Office.

On November 4, 1988, Petitioner COSGRIFF was convicted by a jury at a joint trial on both Oakland County files of possession of 650 or more grams of cocaine (case number 87-82372), possession with intent to deliver marijuana, possession of under 50 grams of cocaine and possession of a taser gun (case number 87-78345). Petitioner was sentenced to life in prison without parole for the offense of possession of 650 or more grams of cocaine[1], and a term of two and one half to four years for possession with intent to deliver marijuana and possession of under 50 grams of cocaine on January 3, 1989.

On January 16, 1990, Petitioner filed his Brief on Appeal to the Michigan Court of Appeals. Thereafter, on April 25, 1991 the Court of Appeals rendered its opinion on all matters raised by Petitioner, and affirmed the trial court's conviction and sentence.

Petitioner was convicted by a jury of conspiracy to possess with intent to deliver over 650 grams of cocaine in the Macomb County Circuit Court on May 25, 1989. On June 23, 1989, the Petitioner was sentenced to life in prison without parole. On October 1, 1990, Petitioner filed a Claim of Appeal pertaining to the Macomb County Circuit Court conviction, and on April 28, 1992 the Michigan Court of Appeals issued its opinion, affirming the conviction and sentence. (See Appendix B).

Petitioner argued before the Court of Appeals:

1). That the evidence used against him in all charges should be suppressed as "fruit of the poisonous tree," as the original seizure which precipitated the impounding and further search of his vehicle was without probable cause and violated his constitutional rights under the United States and Michigan Constitutions.

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[1]Possession of 650 or more grams of cocaine is now punishable by a parolable life sentence in the State of Michigan. See *People v Hasson*, 440 Mich 15; 485 N.W.2d 866 (1992).

2). The second trial in Macomb County violated his constitutional guarantee against being twice put in jeopardy, as he was tried on the same facts and evidence as his previous trial in Oakland County.

The Michigan Court of Appeals found:

1). Trooper Crawford satisfied all of the constitutional requirements for the warrantless seizure, having properly stopped the vehicle for speeding, and having a reason to approach and look into the cab of the pickup truck. The Court also decided that the Trooper's previous experience with narcotics and the Petitioner's behavior before being pulled over gave the officer enough probable cause to seize the cigarette.

2). The Petitioner's constitutional protection against double jeopardy was not violated by the second prosecution and trial in Macomb County. Separate convictions for possession and conspiracy to possess a controlled substance, in the view of the Court, did not violate double jeopardy.

Petitioner timely filed an Application for Leave to Appeal to the Michigan Supreme Court from the judgment of the Michigan Court of Appeals dated June 25, 1991. That application was held in abeyance until the Court released its decision in *People v Hasson*, 440 Mich. 15, 485 N.W.2d 866 (1992). The Michigan Supreme Court denied that application for leave to appeal from the Court of Appeals on August 31, 1992. *People v Cosgriff*, 440 Mich. 893, 488 N.W.2d 740 (1992). (See Appendix A). Petitioner timely filed an Application for Leave to Appeal to the Michigan Supreme Court from the judgment of the Michigan Court of Appeals dated April 28, 1992. That Application for Leave to Appeal was denied in an order issued by the Michigan Supreme Court on December 9, 1992, and the Petitioner's Motion for Reconsideration of the Court's order was denied in an order from the Michigan Supreme Court on May 29, 1993.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in the within cause of action for two reasons:

1). Petitioner's constitutional right to be free from unreasonable searches and seizures was violated by the Michigan State Police seizure of evidence from Petitioner's vehicle and all subsequent evidence obtained from that original seizure should have been suppressed.

2). Petitioner was tried twice on the same facts, circumstances and sequence of events, in violation of the United States Constitution's prohibition of double jeopardy.

ARGUMENT I

THE SEIZURE OF THE HAND ROLLED CIGARETTE BY THE ARRESTING OFFICER WAS WITHOUT PROBABLE CAUSE AND THUS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner contends that Trooper Crawford did not have probable cause to seize the cigarette because observation of the cigarette alone does not give rise to a reasonable belief that the cigarette contained contraband. The warrantless seizure of the hand rolled cigarette was in contravention of the Fourth Amendment to the United States Constitution. The decision of the Michigan Supreme Court and Court of Appeals affirming the trial court's denial of suppression of the marijuana cigarette was a clear violation of Petitioner's Fourth Amendment rights. This issue is of major legal significance because all other searches of the Petitioner and his vehicle were based upon the Trooper's mere suspicion that the hand rolled cigarette contained marijuana. Further, the Petitioner's constitutional rights have been affected because all of the contraband seized including the marijuana cigarette, the marijuana in the pick-up truck, the cocaine found on Petitioner's person and the cocaine found in Petitioner's pick-up truck, are evidence which was derived from the unlawful seizure of the hand rolled cigarette by Trooper Crawford. All of the aforestated evidence must be suppressed as "fruit of the poisonous tree." *Wong Sun v United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

When Trooper Crawford initially approached Petitioner's vehicle after the stop for a traffic violation, he noticed a hand rolled cigarette on a blue jacket in the cab section of the pick-up

truck. Trooper Crawford did not see any other items around the hand rolled cigarette which would lead him to believe it contained marijuana. He could not see the substance which was rolled *inside the cigarette, never felt the substance rolled inside the* cigarette, nor did Petitioner ever make any statement pertaining to the hand rolled cigarette prior to its confiscation. Additionally, Trooper Crawford never smelled any odor of marijuana when he approached the Petitioner's vehicle, nor were there any other indications that the hand rolled cigarette contained marijuana. Trooper Crawford acknowledged that he had previously seen hand rolled cigarettes which did not contain marijuana, and that this particular hand rolled cigarette may or may not have contained marijuana; and that he was not sure at the time of the seizure whether or not it contained marijuana. (Preliminary Exam Transcript 1, p.22-28)[2]

Every warrantless intrusion must be justified by articulable facts which would support the issuance of a warrant based on probable cause. Thus, before an item in plain view may be seized, the law enforcement official:

> ...must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover incriminating evidence "inadvertently"...Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizures [emphasis supplied]. *Texas v Brown*, 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1982).

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[2]The Preliminary Examination Transcript from the 37th District Court was stipulated to by the parties hereto for the purpose of the Trial Court deciding this issue.

As outlined in the above-referenced quote the incriminating nature of the evidence must be "immediately apparent." Seizure on mere suspicion alone is not enough. As the Court explained in *Payton v New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980):

> ...the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. Id. 445 U.S. at 587.

This Court has further defined "probable cause" as facts that:

> would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime. *Texas v Brown, supra*, 460 U.S. at 742.

The Michigan Supreme Court's and Court of Appeal's affirmation of the trial court's denial of the motion to suppress the marijuana cigarette directly conflict with the definitions set forth in *Texas v Brown, supra*. In that case, Brown was arrested after a police officer stopped him in a routine driver's license checkpoint. The officer observed him drop an opaque, green party balloon, knotted near the tip, to the seat beside him. Based on his previous experience with narcotics arrests, discussions with other officers and observation of other containers of possible narcotics in Brown's glove compartment, the officer arrested Brown and searched his vehicle.

This Court, in upholding Brown's conviction, held that the previous experience of the arresting officer fulfilled the probable cause requirement of the "immediately apparent" factor for plain view seizures. In the case at bar, Trooper Crawford readily admitted that all hand rolled cigarettes do not contain contraband and therefore, observation of a hand rolled cigarette alone is not

sufficient for a reasonable and prudent person to believe that the cigarette contained marijuana. Clearly, such an observation could only lead to a mere suspicion. Further, in the case before this Honorable Court, the arresting officer did not perceive an odor of marijuana; did not observe any furtive gesture by Petitioner; nor was Petitioner's conduct otherwise incriminating. Because the record before this Court provides no articulable facts which could transform the officer's mere suspicion into probable cause, the allowance of the seizure is contrary to the rights protected by the Fourth Amendment and conflicts with the prior case law articulated in *Texas v Brown, supra.*

A Michigan Court of Appeals decision which may be persuasive to the Court is *People v Young*, 89 Mich. App. 753, 282 N.W.2d 211 (1979). In *Young* the defendant dropped a tin foil packet from his pocket to the floor of a taxi when he saw the police arrive. The Michigan Court of Appeals found that this activity on the part of the defendant did not amount to probable cause to seize the package even though the officer claimed that, based on his experience, tin foil packets are used to facilitate the drug trade. The *Young* court reasoned that tin and aluminum foil have many legitimate and common uses and that "any inference of criminal activity derived from their mere possession is too expansive for purposes of the Fourth Amendment." 89 Mich. App. at 759, 282 N.W.2d at 213. Clearly, without additional corroborating articulable facts, a police officer does not have probable cause to seize a hand rolled cigarette, just as he does not have probable cause to seize a tin foil packet. There are as many theories consistent with innocence in possession of a hand rolled cigarette, as there are with incrimination. A hand rolled cigarette in and of itself is not sufficient to establish probable cause. As Justice Powell observed in his concurrence in *Texas v Brown*, there was no innocent item that could have been carried in the manner the defendant was

carrying narcotics (in a tied off balloon). The existence of an innocent purpose of the item seized should then, have a mitigating effect on the officer's assessment that there was probable cause to seize the item in question. Also see *U.S. v Moya*, 745 F.2d 1044 (7th Circ.), amend. 761 F.2d 322 (7th Circ. 1984); *United States v Anderson*, 401F. Supp. 996 (1975); *People v Falconer*, 76 Mich. App. 367, 256 N.W.2d 597 (1977), Lv. den. 402 Mich. 816 (1977); *People v Wright*, 80 Ill. App. 3d 927; 400 N.E.2d 731 (1980).

The record before this Honorable Court does not support a finding of probable cause by Trooper Crawford. The mere observance of a hand rolled cigarette is not sufficient, given the fact that there was no odor of marijuana, no sight of marijuana, no statement by the Petitioner as to the contents of said cigarette and no other suspicious activity by the Petitioner. None of these additional articulable facts were present in this case. Accordingly, the opinions of the Michigan Supreme Court and of the Court of Appeals are in contravention to the Petitioner's Fourth Amendment guarantees against unreasonable seizures. Said opinions directly conflict with prior decisions of this Court, and are clearly erroneous, resulting in a material injustice.

ARGUMENT II

THE TRIAL COURT'S FAILURE TO CONSOLIDATE THE TRIALS FROM OAKLAND AND MACOMB COUNTIES INTO ONE TRIAL VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY AND FORCED PETITIONER TO STAND TRIAL TWICE ON THE SAME FACTS AND CIRCUMSTANCES.

The prohibition against being twice placed in jeopardy is a fundamental constitutional protection and is deeply rooted in principles of fairness and due process. This Honorable Court described the essence of this protected interest in *Green v United States*, 355 U.S. 184, 78 S.Ct. 2212, L.Ed.2d 199 (1957):

> ...The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. 355 U.S. at 187-188.

And also in *Abney v United States*, 431 U.S. 651, 95 S.Ct. 1013, 52 L.Ed.2d 651 (1976):

> ...the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. 431 U.S. at 661.

Petitioner was convicted of knowingly or intentionally pos-

sessing a mixture of 650 grams or more of cocaine in the Oakland County Circuit Court on November 4, 1988. Petitioner was convicted of conspiracy to possess with intent to deliver the same cocaine on May 25, 1989 in the Macomb County Circuit Court. The Petitioner was tried twice for one continuous transaction. Because both prosecutions sought to address the same conduct and intent **and** used the same facts, witnesses and evidence, the Macomb County trial and conviction was in direct violation of the Fifth Amendment of the United States Constitution and the above precedents of this Honorable Court.

This Court has examined the question of separate trials for substantive crimes, and conspiracy to commit those crimes, in *U.S. v Felix*, 503 U.S.___, 112 S. Ct. 1377, 118 L.Ed.2d 25 (1992). In that case, defendant Felix had been charged and convicted for the offense of attempting to manufacture methamphetamine in Missouri. During his trial, the Government entered evidence that he had manufactured the drug in a lab in Oklahoma, which had been raided and shut down by the Drug Enforcement Administration. Subsequently, he was indicted, tried and convicted in Oklahoma on charges of conspiracy to possess and distribute methamphetamine. Two of the overt acts supporting these charges were based on the same acts which had been the subject of the Missouri prosecution. Chief Justice Rehnquist noted in his opinion that since the charged crimes in each trial were different in time and place and had no common conduct linking the alleged offenses, the introduction of evidence from the one crime in order to prove state of mind in the other was not placing the defendant in double jeopardy. What distinguishes the case at bar however, is that each trial here was conducted on the same set of facts. Unlike *Felix, supra*, where the introduction of evidence from one conviction was used to develop the evidence for another connected "overlaying" crime, the possession and conspiracy convictions of

Petitioner were on exactly the same facts and circumstances, the same witnesses testified, and the same exhibits were used. In essence, the Petitioner was forced to endure the same trial twice. This is a violation of the protections of the Fifth Amendment to the United States Constitution.

As stated above, part of the protection afforded citizens under the Fifth Amendment is to protect persons from having to defend against the overbearing power of the State and its attempts to retry or reconvict them in different trials. In *Ashe v Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), the State of Missouri attempted to retry and convict defendant on robbery charges for different victims of the same incident. Justice Stewart, delivering the majority opinion of this Court, wrote that the prosecution's attempts at "redefining [its] presentation in light of the turn of events at the first trial" was "precisely what the constitutional guarantee forbids." *Id.* 397 U.S. at 447.

In the present case, the Macomb County prosecutor "redefined its presentation" from that of the Oakland County prosecution in a successful retrial and conviction of Petitioner to show a conspiracy, using the exact same set of facts, witnesses and evidence. Both the Macomb and Oakland County officials cooperated in prosecuting the Petitioner. The exchange of physical evidence, the use of the same law enforcement officials, and the additional assistance by an assistant Oakland County Prosecutor in setting up the continuation of this transaction with the Michigan State Police in the City of New Baltimore, County of Macomb, and State of Michigan, illustrates the degree of community between the two counties.[3]

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[3]See the testimony of Oakland County Assistant Prosecuting Attorney Errol Shiffman who orchestrated the return of Petitioner's vehicle containing the bogus cocaine (TT 05-5-89)

In Michigan, the prosecution is required, except in limited circumstances, to join at one trial all charges which arise out of a single criminal act, occurrence, or transaction.[4] *People v White*, 390 Mich. 245, 212 N.W.2d 222 (1973). Failure to consolidate charges arising out of the same criminal transaction violates the Double Jeopardy Clause of the United States Constitution by forcing the defendant to endure the hardships of continual prosecution by the State. See *Abney v United States, supra*, *Green v United States, supra*, and *North Carolina v Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

By joining in one trial all charges arising out of the same criminal episode, the Petitioner would have been able "to consider the matter closed and saved the costs of redundant litigation." *People v White*, 41 Mich. App. 370, 378, 200 N.W.2d 326, 330; *affirmed* 390 Mich. 245, 212 N.W.2d 222 (1972). Additionally consolidating all charges in one trial prevents prosecutorial sentence shopping and precludes the possibility that the prosecution will have a dry run of its case.

These vital interests and constitutional protections were compromised by failing to dismiss or consolidate the two cases against the Petitioner. First, the Petitioner endured economic hardship by having to relitigate charges involving the same conduct and the same parties. Second, by the Court's failure to join these trials, the Prosecutor in Macomb County was able to wait and see what conviction and/or sentence the Oakland County Court would impose upon the Petitioner. The Macomb County Prosecutor was given the discretion to pursue the charges ostensibly arising within his own jurisdiction. Such a wait and see

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[4]Counsel on behalf of Petitioner made a motion to join the Oakland County action and the Macomb County action before Judge Talbot on October 5, 1988, which was objected to by Macomb County Prosecutor Carl Marlinga, and denied by the Court. (See Plea Hearing Transcript of October 5, 1988, p.55)

posture is precisely the harm sought to be prevented by the double jeopardy clause. The Petitioner has a constitutionally protected interest in being tried in one proceeding for all charges arising out *of a single transaction, thereby preventing harassment of the* Petitioner. Third, the Macomb County prosecutor had the opportunity to determine the strengths and weaknesses of the case through the proceedings and consultations with the Oakland County Prosecutor. Additionally, since the same witnesses and physical evidence were involved in both proceedings, the Macomb County Prosecutor was able to use the Oakland County proceedings as a discovery device. Such an identity of evidence further illustrates the redundant nature of the Macomb County proceeding.

The second trial of Petitioner violated his constitutional guarantee against being tried twice. While under the recent decisions of this Court it is clear that separate convictions for substantive crimes and conspiracy to commit those crimes is not double jeopardy, this Court has limited its ruling to instances where the facts surrounding the convictions have been different in time and place, with no common behavior linking the offenses. The case at bar demands attention as the two convictions involved were based on the same facts and evidence, and were conducted with a high degree of cooperation and exchange of information between the two prosecuting Counties. This was a violation of the guarantees of the Fifth Amendment and the precedents of this Honorable Court. This Court should, therefore, hold that the trial of the Macomb County charge of conspiracy to possess with intent to deliver in excess of 650 grams of cocaine was barred by double jeopardy considerations.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the Judgment and Opinion of the Michigan Supreme Court in this matter.

Respectfully submitted,

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APPENDICES

APPENDIX A -- Opinion of the Michigan Court of Appeals dated June 25, 1991; Orders of the Michigan Supreme Court dated January 31, 1992 and August 31, 1992 ..... A-1

APPENDIX B -- Opinion of the Michigan Court of Appeals, dated April 28, 1992; Orders of the Michigan Supreme Court dated December 9, 1992 and May 28, 1993 ..... B-1

APPENDIX C -- Fourth and Fifth Amendments to the United States Constitution C-1

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff - Appellee,

June 25, 1991

v

No. 119338

JOHN FRANCIS COSGRIFF,
Defendant - Appellant.

Before: Danhof, C.J., and Holbrook, Jr. and Sullivan, JJ.

PER CURIAM.

Defendant was convicted by jury of possession of more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i); possession of marijuana with intent to deliver, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c); possession of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv); and possession/sale of a taser, MCL 750.224a; MSA 28.421(1). Defendant was subsequently sentenced to the mandatory term of life without parole on the conviction for possession of more than 650 grams and terms of 2-1/2 to 4 years on each of the remaining counts. Defendant now appeals as of right. We affirm.

Defendant was stopped by Michigan State Trooper Dwayne Crawford after he was observed speeding along I-75 at speeds in excess of ninety-five miles per hour. As Trooper Crawford approached defendant's vehicle in the left hand lane, defendant was observed by him to look over his left shoulder and then lean over to the right side of the truck.

Defendant stopped and as Crawford approached the driver's side of the truck, defendant appeared to be very nervous and was

shaking. Upon request, defendant produced a driver's license in the name of Larry Jennings. Defendant's demeanor became more nervous and agitated. At this point, Trooper Crawford observed on the center console what he believed, based on training and experience, to be a marijuana cigarette. The cigarette observed by Crawford was four inches long and was rolled and tapered at both ends. Thereupon, Crawford asked defendant to exit the truck, confiscated the cigarette and placed defendant under arrest. In the subsequent search of defendant, Crawford felt a bulge in defendant's right front pants pocket. Defendant began jerking and Crawford pulled out a small vial containing what he believed to be cocaine.

After reading defendant his rights, Crawford requested permission to search defendant's trunk, to which defendant responded that he had nothing to hide. The search turned up one partially burned marijuana cigarette as well as a whole one. Crawford then radioed for assistance and upon his arrival at the scene, Trooper Scott continued the search. Trooper Scott discovered a garment bag containing several marijuana packages on the passenger seat and a taser gun on the floor. An inventory search of the truck at the New Baltimore State Police Post revealed a wallet with a Florida driver's license in the name of John Cosgriff, a Rolex watch, a camera, and miscellaneous other items.

Defendant was readvised of his rights upon arrival at the station. Defendant indicated he understood his rights and was willing to talk. Defendant indicated that he knew he was carrying marijuana but would give no further information other than that he was paid to pick it up and deliver it.

Thirty days later, Michigan State Police Sgt. Thomas Ackley received information concerning defendant's arrest which led him to request a search of defendant's pickup truck by a narcotics dog. During the search, the dog indicated the presence of narcotics beneath the inside panel of the truck at the wheel well. A search

warrant was prepared and executed. When the bed liner was removed, along with the back panels, eight packages of cocaine containing 3-1/2 kilos were discovered.

The truck was taken to East Lansing where the state police installed electronic surveillance equipment. At that time, bogus cocaine was placed in the side walls of the truck and were sprayed with theft detection powder.

Subsequent thereto, a drug forfeiture agreement was drawn in which defendant would purchase the truck back for $3,000. Defendant received the truck on May 26, 1987, accompanied by his attorney, George Birch. Defendant was then under surveillance to Chaplin's Bar, where he was met by Mr. Birch and a third individual, David Breger. The three men were observed walking around the truck and looking underneath it.

The three men then proceeded to a car wash in separate vehicles. Defendant was observed driving the truck into a stall and Mr. Breger was observed parking his car behind the car wash. Mr. Birch washed his car and then parked it next to Breger's. Upon activation of the alarm system, all three individuals were placed under arrest.

I

The first issue defendant raises is whether the seizure of the hand rolled cigarette by arresting officer was without probable cause and thus violative of the Fourth Amendment. We disagree. The Fourth Amendment does not prohibit the warrantless seizure of evidence in "plain view". Coolidge v New Hampshire, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971). When the police are justified for intruding into an otherwise protected area and the evidence is obviously incriminatory or contraband, it may be seized without a warrant. People v Myshock, 116 Mich App 72, 75-76; 321 NW2d 849 (1982). Although inadvertent discovery of such evidence is usually characteristic of most legitimate plain

view seizures, it is not a necessary condition. Horton v California, US___;___ S Ct __; 110 L Ed 2d 112 (1990). In addition, there must be exigent circumstances. People v Raybon, 125 Mich App 295, 301; 336 NW2d 782 (1982).

In the case at bar, defendant's vehicle was properly stopped for speeding. The officers therefore had a right to approach the vehicle, keep its passengers under observation, People v Eichenberg, 108 Mich App 578, 580; 310 NW2d 800 (1981), and look inside the vehicle, People v Julkowski, 124 Mich App 379, 384; 335 NW2d 47 (1983). The truck's mobility provided the necessary exigent circumstance. People v Futrell, 125 Mich App 568, 572-573; 336 NW2d 834 (1983).

Therefore, the only issue to be resolved is whether the cigarette was "obviously" incriminating or contraband. To satisfy this element, the officer need only have probable cuase that the object is evidence or an implement of a crime. People v Dugan, 102 Mich App 497, 504; 302 NW2d 209 (1980), lv den 411 Mich 99 (1981), cert den 455 US 297; 102 S Ct 1292; 71 L Ed 2d 471 (1982).

We believe that Trooper Crawford's observations and experience in narcotics, combined with defendant's furtive gesture before pulling over and extreme nervousness provided probable cause to seize the cigarette. See People v Kincaid, 95 Mich App 156; 284 NW2d 486 (1977). The trial court's denial of defendant's motion to suppress the evidence of the marijuana cigarette was proper.

II

A

Defendant next questions whether the affidavit in support of the warrant for the search of his truck met the requirements for establishing probable cause for search warrants on the basis of informant supplied information. Defendant argues the affidavit was insufficient due to infirmities under People v Sherbine, 421

Mich 502; 364 NW2d 658 (1984). Specifically, defendant asserts that the affidavit does not supply probable cause because it does not provide any information that a magistrate could use to determine that the unnamed informant was credible and the information reliable. We disagree. Unlike the affidavit in Sherbine, which was based solely on information obtained from an informant, the affidavit in the case at bar was also based upon non-hearsay investigation. After receiving the information from their informant, the police conducted an independent investigation by using a trained narcotics dog. The dog's reactions indicated the presence of narcotics at the driver's side rear wheel well and the rear corner of the passenger side. When read as a whole, the affidavit presented the magistrate with probable cause to believe that controlled substances were contained within the panels of defendant's truck. See People v Hall, 158 Mich App 194, 198; 404 NW2d 219 (1987).

B

Defendant also challenges the use of the dog in the inspection of the truck, arguing that it constituted an illegal warrantless search but cites no authority in support of this proposition. Defendant may not merely announce his position and then leave it to this Court to discover a basis for his claims. Argument must be supported by citation to appropriate authority or policy. People v Sowders, 164 Mich App 36, 49; 417 NW2d 78 (1987). This claim of error has, therefore, been abandoned.

C

Defendant further maintains that the affidavit failed to make a sufficient showing as to the reliability of the dog in detecting a particular type of contraband. Defendant compares the use of the dog to use of an informant and again argues that the requirements in Sherbine, supra, must be met. Defendant fails to cite authority in support of this argument and is therefore abandoned. A review

of the affidavit, however, reveals that the dog in question had experience and training sufficient to show reliability.

D

Thus we conclude that the search warrant allowing the search of the truck was valid and the trial court properly denied the motion to suppress.

III

Defendant next argues that the Installation of the electronic surveillance equipment, including an alarm system, in his vehicle prior to the issuance of a warrant constituted an unconstitutional search and seizure requiring suppression of any and all evidence derived. We disagree.

Following the discovery of the marijuana in defendant's truck, it was seized and was subject to forfeiture under the drug forfeiture laws. Forfeiture proceedings were instituted by the prosecutor's office and notice was served on defendant. On April 27, 1987, after the 3-1/2 kilos of cocaine were discovered, electronic equipment was installed in the truck and bogus cocaine, sprayed with theft detection powder, placed in the wheel well. On April 29, 1987, the prosecutor's office contacted defendant's attorney to inquire if defendant was interested in buying the truck back. Upon learning the defendant was interested in buying back the truck, a search warrant was drawn up for the surveillance equipment and signed by a magistrate on May 19, seven days before defendant regained possession of the truck for $3,000.

Defendant cites People v Beavers, 393 Mich 554; 227 NW2d 522 (1975), cert den 423 US 878; 96 S Ct 152; 46 L Ed 2d 111 (1975), for the proposition that Michigan courts have never authorized the use of electronic surveillance equipment without a search warrant. While this is absolutely correct, it remains that in the instant case the surveillance equipment was not put into use until after the search warrant was duly authorized. At the time the

equipment was placed in the truck, defendant did not have an expectancy of privacy in it. Defendant has pointed to no constitutional deprivation as a result of the equipment being installed while the truck was in police custody prior to the warrant being issued. Again, the trial court properly denied defendant's motion to suppress.

IV

Defendant next argues that his confession should have been suppressed as a result of the police officers; failure to follow both state and federal constitutional mandates. Specifically, defendant asserts the prosecution has failed to establish by a preponderance of the evidence that he voluntarily waived his rights, that the delay in time between the advice of rights and his subsequent statement requires suppression, and that his statement should be suppressed as being "the fruit of a poisonous tree".

When reviewing a trial court's determination of voluntariness, this Court must examine the entire record made and make an independent determination. People v Stricklin, 162 Mich App 623, 635; 413 NW2d 457 (1987). Great deference is given to the trial court's assessment of the credibility of the witnesses, People v Marbury, 151 Mich App 159, 161; 390 NW2d 659 (1986), and the trial courts will not be reversed unless they are clearly erroneous. People v Kvam, 160 Mich App 189, 196; 408 NW2d 71 (1987). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. Id.

A review of the transcript of the hearing held pursuant to People v Walker (On Reh), 373 Mich 331, 338; 132 NW2d 87 (1965), to determine the voluntariness of defendant's waiver of his constitutional rights reveals that defendant's assertion is without merit. The record shows that defendant understood his rights and gave a voluntary statement. The trial court's finding of

voluntariness was not clearly erroneous.

The failure to reread defendant his rights prior to each interrogation does not render subsequent statements inadmissible. Rather, it raises a factual question as to whether the statements were voluntary. People v Godboldo, 158 Mich App 603, 607; 405 NW2d 114 (1986). Therefore, having determined the statements were voluntary, the delay in time between the warnings and the statement does not warrant suppression.

Likewise with defendant's argument that the statements require suppression as "fruit of the poisonous tree." Having previously concluded that the search and seizure was constitutional, there is no "poisonous tree" from which fruit would fall so as to warrant suppression of the statement.

V

Next, defendant argues that the trial court's denial of his motion to sequester witnesses without a valid reason amounted to an abuse of discretion. We agree. However, defendant has not shown that the failure to separate the witnesses resulted in such prejudice that the jury would have reached a different result had the motion been granted. See People v Lewis, 31 Mich App 433, 438; 108 NW2d 107 (1971). The key officers testified substantially the same at the preliminary examination as they did at trial. Additionally, there was no major dispute among the prosecution's witnesses concerning the incident relative to defendant's behavior. See People v Erb, 48 Mich App 622, 626; 211 NW2d 51 (1973).

Having shown no prejudice, the trial court's improper denial of defendant's motion to sequester witnesses amounts to harmless error.

VI

Defendant further contends that the improper admission of the title history of defendant's truck requires reversal of his

conviction. We do not agree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. People v Watkins, 176 Mich App 428, 430; 440 NW2d 36 (1989). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. Id. When reviewing a court's decision to admit evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was a kind properly considered by the jury. Schanz v New Hampshire Ins Co, 165 Mich App 395, 405; 418 NW2d 478 (1988), Lv den Mich 865 (1988).

At trial, defense counsel objected to the introduction of the motor vehicle's title history on hearsay and authenticity grounds. In response, the prosecutor argued that the public records were admissible under MRE 803(8) without a requirement of certification or of a record keeper testifying. Defense counsel argued that certification was required pursuant to MRE 901 or 902. Defense counsel did not, however, object under MRE 1005, the rule under which he is arguing on appeal. Objections to evidence must specify the same ground for challenge as the party seeks to assert on appeal. People v Furman, 158 Mich App 302, 329-330; 404 NW2d 246 (1988), Iv den 430 Mich 889 (1988).

Considering the issue in light of the objection below, the trial judge did not abuse his discretion in admitting the document into evidence. The testimony clearly established that defendant was the driver of the truck and that he was aware of the presence of the cocaine. Additionally, defendant produced an Illinois registration for the truck and that he was aware of the presence of the cocaine. Additionally, defendant produced an Illinois registration for the truck in his alias name, Larry Jennings, as the registered owner.

Even if the title history were wrongly admitted, it would constitute harmless error since ownership of the truck had no bearing on the possession of the cocaine as defendant's knowledge of same was established by his own statement.

VII

Next, defendant argues that the trial court's denial of his request for jury instructions on lesser-included offenses requires reversal. We disagree.

While possession of lesser amounts of cocaine are crimes within the same category as possession over 650 grams and share some elements with the greater offense, they also contain essential elements not present in the greater offense, namely proof of lesser quantities of controlled substances. These lesser offenses are therefore considered to be cognate offenses. As such, the trial court must examine the evidence presented and give the requested instruction only when the evidence adduced would support a conviction for the lesser offense. People v Beach, 429 Mich 450, 464; 418 NW2d 861 (1989).

To convict defendant of the included offense of possession of 225 to 649 grams of cocaine, the jury would have to believe that the actual amount of cocaine found in defendant's truck was less than what was testified to at trial. We therefore conclude that the evidence presented did not indicate defendant was guilty of the lesser offense and as a result, the trial court's refusal to give the instruction was correct.

VIII

Defendant also argues that various assertions made throughout the prosecutor's closing argument were substantially prejudicial to him, resulting in a miscarriage of justice.

Appellate review of allegedly improper remarks is precluded if defendant fails to timely and specifically object unless failure to review the issue would result in a miscarriage of justice. People

v Gonzalez, 178 Mich App 526, 534-535; 444 NW2d 228 (1989), lv den 434 Mich 908 (1990). The goal of a defense objection to prosecutorial remarks is a curative instruction. People v Hall, 396 Mich 650, 655; 242 NW2d 377 (1976); People v Fuqua, 146 Mich App 250, 254; 379 NW2d 442 (1985), Lv den 424 Mich 863 (1985). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. Gonzalez, supra, p 535.

After review of the record, we conclude that any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. Thus, since defense counsel failed to object to the comments at trial, preferring instead to move for a mistrial after the jury had been instructed, we will not review the comments.

IX

Lastly, consistent with established precedent in this Court, we hold that defendant's mandatory term of life imprisonment does not constitute cruel and unusual punishment.[1] People v Harmelin, 176 Mich App 524, 525; 440 NW2d 75 (1989), lv den 434 Mich 863 (1990), cert granted__ US __(5/29/90).

Affirmed.

/s/ Robert J. Danhof
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan

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[1] Judge Holbrook remains steadfast in his belief that a mandatory life sentence without parole for offenses involving 650 grams or more of a controlled substance constitutes cruel and unusual punishment. See People v Harding, 163 Mich App 298; 413 NW2d 777 (1987) (Holbrook, Jr., J., dissenting), vacated on other grounds 430 Mich 859 (1988). Judge Holbrook believes, however, that affirmance of the sentence is required by Administrative Order No. 1990-6 and reluctantly does so. Judge Sullivan agrees with Judge Holbrook.

Order

Entered: January 31, 1992

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

91995

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Apellee,

v

JOHN FRANCIS COSGRIFF,
Defendant - Appellant.

SC: 91995
COA: 119338
LC: 87-78345-FH
87-82372-FH

On order of the Court, the application for leave to appeal is considered and, it appearing to this Court that the case of People v Hasson (Docket No. 89662) is pending on appeal before this Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we ORDER that the application be held in abeyance pending the decision in that case.

80128

Order

Entered: August 31, 1992

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

91995

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Apellee,

v

JOHN FRANCIS COSGRIFF,
Defendant - Appellant.

SC: 91995
COA: 119338
LC: 87-78345-FH
87-82372-FH

By order of January 31, 1992, the application for leave to appeal was held in abeyance for People v Hasson (Docket No. 89662). On order of the Court, the decision having been issued on June 16, 1992, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. See, however, People v Hasson, 440 Mich 15, 42-43 (1992).

80825

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN — April 28, 1992
Plaintiff - Appellee,

v — No. 124841

JOHN FRANCIS COSGRIFF,
Defendant - Appellant.

Before: Cavanagh, P.J., and Connor and R.J. Snow,* JJ.

PER CURIAM.

On May 25, 1989, following a jury trial in Macomb Circuit Court, defendant was convicted of conspiracy to possess with the intent to deliver over 650 grams of a controlled substance. MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), MCL 750.157a; MSA 28.354(1). On June 23, 1989, defendant was sentenced to life in prison without parole. Defendant appeals as of right and we affirm.

Defendant was stopped by a state trooper after he was observed speeding along I-75 in Oakland County at speeds in excess of ninety-nine miles per hour. As the state trooper approached defendant's vehicle, he observed what he believed to be a marijuana cigarette in the cab of defendant's pickup truck. The trooper asked the defendant to get out of the truck. He seized the cigarette and placed the defendant under arrest. In the subsequent search of the defendant's person and truck, a small vial containing cocaine was found in defendant's pants pocket and a garment bag containing marijuana was found in the passenger compartment. The defendant's truck was impounded and taken to the New

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*Former Circuit Court judge, sitting on the Court of Appeals by assignment.

Baltimore State Police Post. In Oakland Circuit Court, case no. 87-78345, defendant was convicted of possession with intent to deliver marijuana and possession of under 50 grams of cocaine. These convictions are not part of the present appeal.

While defendant's pickup truck was in the impound yard, the state police were informed that narcotics were hidden in secret compartments in the truck. The state police secured a search warrant and when the bed liner and the back panels of the truck were removed, eight packages containing 3-1/2 kilos of cocaine were discovered. In Oakland Circuit Court, case no. 87-82732, defendant was convicted of possession of more than 650 grams of a controlled substance. This conviction is also not part of the present appeal.

Electronic surveillance equipment was installed in defendant's truck and the packages of cocaine were replaced with packages of Bisquick that had been treated with a theft detection powder. When defendant, accompanied by his attorney, regained possession of his truck, the state police placed the men under surveillance. The two men were followed to a bar in Macomb County where they were joined by a third individual. The state police watched as the three men searched the truck for bugs in the parking lot of the bar. The three men then each drove separately to a car wash where they were arrested after the packages of Bisquick were removed from the defendant's truck. In Macomb Circuit Court, case No. 88-0223, defendant was convicted of conspiring to possess with the intent to deliver over 650 grams of a controlled substance. This conviction is the subject of the present appeal.

In his first four appellate issues, defendant raises constitutional challenges to the seizure of the marijuana cigarette that occurred on I-75, to the issuance of the warrant that allowed the search of his pickup truck while in the state police impound yard,

to the installation of the electronic surveillance equipment in his truck, and to the admission of an inculpatory statement that he gave to the police. Defendant claims that his conviction for conspiracy must be vacated under the "fruit of the poisonous tree" doctrine.

However, the first four issues in the present appeal were raised and disposed of by a panel of this Court in People v Cosgriff, unpublished per curiam opinion of the Court of Appeals, decided 6/25/91 (Docket No. 119338), when defendant appealed his Oakland County convictions. Collateral estoppel bars the relitigation of issues previously decided where such issues are raised in a subsequent action by the same parties. People v Watt, 115 Mich App 172, 175; 320 NW2d 333 (1982).

In his fifth issue, defendant claims that his constitutional protection against double jeopardy was violated when he was tried and convicted of possession of over 650 grams of a controlled substance in Oakland County and was subsequently tried and convicted for conspiracy to possess the same controlled substance in Macomb County. We disagree. Separate convictions and punishment for possession of a controlled substance and for conspiracy to possess the same controlled substance do not violate double jeopardy. See People v Sammons, 191 Mich App 351, 375;__ NW2d__ (1991).

Defendant next argues that his conviction should be vacated and that he should be allowed to enter a guilty plea to conspiracy to possess with intent to deliver an amount more than 225 grams but less than 650 grams of a controlled substance or be tried on this lesser charge. Apparently, the parties negotiated a plea bargain wherein defendant would be allowed to plead guilty to the lesser charge in exchange for the prosecutor's recommendation of a seven year minimum sentence. And, on November 18, 1988, defendant entered a guilty plea to the lesser charge only to have

the trial court reject the plea when defendant appeared for sentencing on January 20, 1989. In the interim, defendant contends that the trial judge had an improper ex parte communication with a police officer that influenced the trial judge's decision to reject his guilty plea. Defendant claims that the only way to remedy such egregious misconduct would be to allow him to plead or to be tried on the lesser charge. Again we disagree.

While we certainly do not condone the ex parte communication that occurred in this case, the decision to accept or reject a plea is within the trial court's discretion. People v Banning, 329 Mich 1; 44 NW2d 841 (1950). And, if the plea agreement includes a nonbinding prosecutorial recommendation of a specific sentence, the defendant may withdraw his guilty plea should the trial judge choose a different sentence. People v Killebrew, 416 Mich 189, 209; 330 NW2d 834 (1982).

The judge who originally accepted the plea in this case expressed some reservations with the prosecutor's sentencing recommendation when the plea was offered and gave the defendant the opportunity to withdraw his plea. Under Killebrew, no more is required.

We also reject defendant's contention that he was entitled to a jury instruction in accordance with Wharton's Rule. This rule bars a conspiracy prosecution only when the substantive offense necessarily requires the participation and cooperation of two persons, an element not present in the offense of possession with intent to deliver a controlled substance. See People v Betancourt, 120 Mich App 58, 64; 327 NW2d 390 (1982).

With respect to the second instructional error claimed by the defendant, we cannot agree that attempted possession is a cognate lesser included offense of conspiracy. Cognate lesser included offenses are those that share several elements and are of the same class or category. People v Ora Jones, 395 Mich 379, 387; 236

NW2d 461 (1975). Because conspiracy to possess a controlled substance and attempted possession of a controlled substance do not share common elements and are not members of the same class or category, we find no error in the trial court's decision not to instruct the jury on attempted possession.

Finally, defendant argues that his sentence of mandatory life in prison without the possibility of parole amounts to cruel and unusual punishment. Consistent with existing precedent, we can only conclude that defendant's mandatory term of life imprisonment does not constitute cruel and unusual punishment. People v Alexander, 188 Mich App 96, 106; 469 NW2d 10 (1991) and the cases cited therein.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Connor
/s/ Roman J. Snow

Order

Entered: December 9, 1992

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

93920

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Apellee,

v

JOHN FRANCIS COSGRIFF,
Defendant - Appellant.

SC: 93920
COA: 124841
LC: 88-223-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, CJ., and Levin, J., would grant leave to appeal.

81203

Order

Entered: May 28, 1993

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

93920(52)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Apellee,

v

JOHN FRANCIS COSGRIFF,
Defendant - Appellant.

SC: 93920
COA: 124841
LC: 88-223-FC

On order of the Court, the motion for reconsideration of this Court's order of December 9, 1992 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Levin, J., states as follows:

I dissent from the denial of reconsideration for the reasons stated in my dissenting statement in People v Fluker, ___Mich ___ (1993).

50525

APPENDIX C

AMENDMENT [IV.]

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any cirminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.